

BEFORE THE TAX COMMISSION OF THE STATE OF IDAHO

In the Matter of the Protest of)	
)	DOCKET NO. 20307
[Redacted],,)	
)	DECISION
Petitioner.)	
_____)	

On March 30, 2007, staff of the Sales, Use, and Miscellaneous Tax Audit Bureau (Bureau) of the Idaho State Tax Commission (Commission) issued two Notices of Deficiency Determination to [Redacted]. One Notice proposed additional use tax, penalty, and interest in the total amount of \$146,666 for the period January 1, 2000, through December 31, 2005.

The second Notice proposed additional withholding tax, penalty, and interest in the total amount of \$73,693 for the period January 1, 1997 through December 31, 2005. The Taxpayer filed a timely appeal and petition for redetermination for each Notice on May 16, 2007. An informal conference to discuss both Notices was requested and held via telephone on December 4, 2007, followed by a second telephone conference on May 1, 2008.

The Commission has reviewed each file, is advised of their contents, and hereby issues its decision affirming the first Notice of Deficiency Determination in part, and modifying it in part. The Commission affirms the second Notice of Deficiency Determination with a minor adjustment in the Taxpayer's favor.

DISCUSSION OF FACTS - USE TAX AUDIT

The Taxpayer is a [Redacted] company that conducted [Redacted] activities in Idaho under contracts with [Redacted], the [Redacted] and the United States [Redacted]. During the time period under audit, the Taxpayer did not have an Idaho use tax reporting number. The auditor identified [Redacted] that were engaged in [Redacted] under contracts between the

Taxpayer and the [Redacted]. The use of [Redacted] in Idaho is the issue before the Commission.

The [Redacted] are owned by the Taxpayer. Employees of a business engaged in [Redacted] under contract to a [Redacted] agency typically include the [Redacted], [Redacted]. The [Redacted] services the [Redacted]. [Redacted] There were two types of contracts in effect between the Taxpayer and the [Redacted] at various times during the audit period. An “exclusive use contract” pays for [Redacted]. [Redacted].

[Redacted] **OVERVIEW OF APPLICABLE IDAHO SALES AND USE TAX LAW**

The sale of tangible personal property in Idaho is taxable unless some exemption applies (Idaho Code § 63-3601 *et. seq.*). Generally, tangible personal property brought into Idaho is subject to a use tax if a tax was not paid in the state where it was purchased or used and no exemption for its use in Idaho exists. The use tax rate is identical to the sales tax rate. Credit is given for sales and use taxes rightly paid to another state where the goods were purchased or used (Idaho Code § 63-3621(j)).

The following are relevant portions of Idaho Code § 63-3621 that pertain to use tax:

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after October 1, 2006, for storage, use, or other consumption in this state at the rate of six percent (6%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property....

(a) Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax. His liability is not extinguished until the tax has been paid to this state....

(j) When the tangible personal property subject to use tax has been subjected to a general retail sales or use tax by another state of the United States in an amount equal to or greater than the amount of the Idaho tax, and evidence can be given of such payment, the property will not be subject to Idaho use tax. If the amount paid

the other state was less, the property will be subject to use tax to the extent that the Idaho tax exceeds the tax paid to the other state (Idaho Code § 63-3621. *Note:* the sales/use tax rate varied during the period under audit, and the audit results reflect the applicable rate.)

The tax statute addresses use tax in the context of a common occurrence - out of state contractors who bring equipment and vehicles into Idaho on a transient basis to accomplish some work, such as road building, home building, aerial spraying, and in the instant case, [Redacted].

Use tax on transient equipment. (a) As used in this section, the term "transient equipment" means tangible personal property which is:

- (1) Subject to use tax in this state; and
- (2) Eligible for depreciation under the federal internal revenue code and actually depreciated on the owner's federal income tax return; and
- (3) Present in this state for a cumulative period of time totaling not more than ninety (90) days in any consecutive twelve (12) months. For purposes of this subsection, any part of a day is one (1) day.

(b) In the case of transient equipment owned and operated by a nonresident of this state, the use tax imposed by section 63 3621, Idaho Code, may be the lesser of the amount of tax computed upon:

- (1) The value of the property. A recent sales price shall be presumptive evidence of the value of the property. If there is no recent sales price, the value shall be the fair market value of the property on the date the property is first brought into Idaho; or
- (2) The fair rental value of the property during the time the property is located in Idaho. Fair rental value is the amount for which the same or similar property could be leased or rented by the taxpayer from another, unrelated person in the business of leasing or renting such equipment for profit. A taxpayer electing to pay use tax on the fair rental value must establish the value by clear and convincing evidence. Any allowable credit for sales or use taxes paid to another state shall be first exhausted before any tax becomes due under this section.

(c) If transient equipment taxed upon its fair rental value ceases to qualify as transient equipment, it shall be taxed as provided in section 63 3621, Idaho Code, based upon the value at the time the equipment ceased to qualify.

(d) A taxpayer may elect to pay tax on the fair rental value on or before the due date of the first tax return on which the use tax is due. The election need not be filed with the state tax commission

but must be reflected in the records supporting the computation of the tax shown to be due on the return. After the due date of the first tax return on which the use tax is due, an election may only be made with the written approval of the state tax commission. The commission shall grant approval only upon evidence establishing that at the time the equipment first became subject to use tax in this state, the taxpayer intended a use for the equipment which would have qualified the property as transient equipment.

(e) Upon discovery of property subject to use tax in this state in regard to which no use tax has been reported, the state tax commission may assert use tax in the manner provided in section 63 3629, Idaho Code, based upon the fair rental value if the commission finds that at the time the equipment first became subject to use tax in this state, the taxpayer intended a use for the equipment which would have qualified the property as transient equipment. (Idaho Code § 63-3621A, Emphasis added.)

The auditor determined a liability because she believed that the Taxpayer's primary use of [Redacted] did not qualify for any exemption allowed under the statute. She determined the liability for [Redacted] based on the guidelines of the preceding statute. The Taxpayer did not raise an objection to the valuation method, presumably because it disagreed with the underlying premise that a use tax was due.

ANALYSIS AND CONCLUSIONS

As established previously, a use tax is owed on goods brought to Idaho unless a tax was rightly paid elsewhere or an exemption applies. No tax was owed in [Redacted], according to the Taxpayer, and no tax was rightly paid elsewhere. Idaho's exemption statute follows, in pertinent part:

Aircraft. There is exempted from the taxes imposed by this chapter:

(1) The sale, lease, purchase, or use of aircraft primarily used to transport passengers or freight for hire (Idaho Code § 63-3622GG).

Sales and use tax administrative Rule 037 interprets the statute, shown below in pertinent part:

01. Definitions. For the purposes of this rule, the following terms have the following meanings: (7-1-94)

b. Freight. Goods transported by a carrier between two (2) points. Freight does not include goods which are being transported for the purpose of aerial spraying or dumping. See Subsection 037.05 of this rule. (4-11-06)

c. Transportation of Passengers. The transportation of passengers means the service of transporting passengers from one (1) point to another. It does not include survey flights, recreational or sightseeing flights, nor does it include any flight that begins and ends at the same point..... (4-11-06)

f. Day. For the purpose of this rule any part of a day is a day. (7-1-94)

g. Transportation of freight or passengers for hire. For the purposes of this rule, "transportation of freight or passengers for hire" means the business of transporting persons or property for compensation. Such transportation must be offered to the general public. Entities such as LLCs or closely held corporations, that only transport related parties, including but not limited to employees or family members of the owner of the aircraft are not in the business of transporting freight or passengers for hire. (3-30-07)

02. Sales of Aircraft. Sales of aircraft are taxable unless an exemption applies. Section 63-3622GG, Idaho Code, provides an exemption for the sale, lease, purchase, or use of an aircraft: (4-11-06)

a. Primarily used to transport passengers or freight for hire;... (2-18-02)

05. Aerial Contracting Services. Businesses primarily engaged in the application of agricultural chemicals as described in Federal Aviation Regulation Part 137, or in activities involving the carrying of external loads as described in Federal Aviation Regulation Part 133, such as aerial logging, are performing aerial contracting services. Such businesses are not primarily engaged in the transportation of freight. (4-11-06)

a. Aircraft purchased, rented, or leased for aerial contracting are subject to sales tax. It makes no difference whether or not the service is provided to a government agency or a private individual or company. Sales or use tax also applies to the purchase of repair parts, oil, and other tangible personal property. (7-1-94)

(Idaho Sales and Use Tax Administrative Rule, IDAPA 35.01.02.037, Aircraft and Flying Services.)

The Commission did not receive copies of federal contracts held by the Taxpayer. However, it accessed public information at [Redacted] where one can read a [Redacted]. [Redacted]

[Redacted]The Taxpayer asserts that it is a Federal Aviation Administration (FAA) certified carrier, under Parts 119 and 135 of a U.S. Code (it may have other certifications we are not aware of), and that every flight it makes under contract with a [Redacted] is considered by the FAA to be for transportation of people or freight. This fact, the Taxpayer contends, allows it to purchase and use [Redacted] free from sales or use tax in [Redacted], where the company is principally based. The Taxpayer believes that the FAA's characterization of its activities is, or should be, a bar from taxation by Idaho and all states where it performs [Redacted] activities.

There is no authority in the Idaho tax code for such a conclusion, and the Commission is not aware of any federal pre-emption from imposing a tax on the use of aircraft, absent an Idaho statutory exemption. While sales and use tax statutes have similarities among states, each state legislature is responsible for enacting its tax statutes, granting exemptions, and defining terms. The Commission is not bound by [Redacted] aircraft exemption statute, and it need not be tied to [Redacted] definitions of transportation, passengers, and freight, even though that state might define them by reference to federal regulations.

The Commission disagrees that the Taxpayer derives its [Redacted] sales tax exemption in [Redacted] *solely* from its FAA certification and [Redacted] reference to it. [Redacted]).

Thus, [Redacted] have independent ways of judging the application of tax. [Redacted] bases its decision on the first 12 months of use and is unconcerned with subsequent use. Idaho bases its decision on use during the audit period.

The Taxpayer declares that states near or contiguous to Idaho enacted [Redacted] use tax exemptions identical [Redacted]. The following examines that claim.

[Redacted]Thus, of the six contiguous states, two do not recognize the exemption sought by the Taxpayer, and two recognize it only because there is no sales or use tax statute.

The following is a summary of [Redacted]sales and use exemptions in states geographically close, but not contiguous, to Idaho. [Redacted]Thus, while the Taxpayer suggests that Idaho is either out of step with the exemptions allowed by [Redacted] and nearby states or that the Commission is misinterpreting its own statute, the Commission concludes that each state has its own legislative language and that in some states, the exemptions are not as inclusive as the Taxpayer believes.

[Redacted]The Commission would prefer to know the number of passenger flights relative to all other flights to arrive at a conclusion, but it can only use what is available. In the absence of more specific or objective data, the Commission has applied common sense that, far from irrefutable, lends credibility to its conclusion. It has considered the following.

[Redacted]A determination of the State Tax Commission is presumed to be correct (*Albertson's, Inc. v. State, Dept. of Revenue*, 106 Idaho 810, 814, 683 P.2d 846, 850 1984), and the burden is on the taxpayer to show that the deficiency is erroneous (*Parsons v. Idaho State Tax Commission*, 110 Idaho 572, 574-575 n.2 Ct. App. 1986).

[Redacted]The auditor used available information from the Taxpayer to verify the Commission's long-held conclusions.

[Redacted]**DISCUSSION OF FACTS—WITHHOLDING TAX AUDIT**

[Redacted]The Taxpayer provided Idaho payroll detail following the issue of the Notice of Deficiency Determination. Idaho wages subject to withholding were adjusted using this detail, and a modified amount representing tax, penalty, and interest was asserted.

CALCULATION OF THE DEFICIENCY

[Redacted]**ANALYSIS AND CONCLUSIONS**

The Taxpayer indicated that it relied on advice and services provided by ADP, a well-known payroll management and processing company. The Taxpayer says that ADP stands behind its decision not to withhold taxes for Idaho during the audit period. The Taxpayer stated that it could direct ADP to amend its previous filings with [Redacted] and work with its employees and Idaho to remedy the deficiency, but it has not done so.

It is difficult for the Commission to understand why a company such as the Taxpayer, working in a multistate environment and represented by a well recognized payroll processing provider, would not attempt to follow Idaho law. The Taxpayer suggests that Idaho should accept its past behavior because the withholding amounts in question are, in its opinion, minimal. Further, it states, taxes were paid, albeit to [Redacted], which put those funds to worthwhile use for the general good. The Commission declines to accept this reasoning or outcome in light of its legislatively mandated responsibility to enforce Idaho's tax laws and its desire to treat similarly situated taxpayers equally.

[Redacted]The Commission finds the addition of interest and penalty to the taxpayer's liability appropriate per Idaho Code §§ 63-3045 and 63-3046. Interest is calculated to August 27, 2008.

WHEREFORE, the Notice of Deficiency Determination dated March 30, 2007, is hereby MODIFIED, and as so modified is APPROVED, AFFIRMED, and MADE FINAL.

IT IS ORDERED and THIS DOES ORDER that the taxpayer pay the following tax, penalty, and interest:

USE TAX	PENALTY	INTEREST	SUBTOTAL
\$90,600	\$4,530	\$47,733	<u>\$142,863</u>
WITHHOLDING	PENALTY	INTEREST	SUBTOTAL
\$51,317	\$2,566	\$23,611	<u>\$ 77,494</u>
		<u>TOTAL</u>	<u>\$220,360</u>

DEMAND for immediate payment of the foregoing amount is hereby made and given.

An explanation of the petitioner's right to appeal this decision is enclosed.

DATED this _____ day of _____, 2008.

IDAHO STATE TAX COMMISSION

COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2008, a copy of the within and foregoing DECISION was served by sending the same by United States mail, postage prepaid, in an envelope addressed to:

[Redacted]

Receipt No.
